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Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

ROBERT G. TRUJILLO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether Petitioner's sentence was excessive, cruel, and unusual in violation of the Eighth Amendment to the United States Constitution.

II. Whether Petitioner was unfairly prejudiced and denied the right to a fair trial where the Petitioner was denied effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Robert G. Trujillo, Petitioner herein respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois entered in the above-entitled case.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Second Judicial District was filed on September 11, 1995 and was not reported. It is reproduced in the Appendix (App.1 - App.33, *infra*).

The Supreme Court of Illinois denied leave to Appeal on December 6, 1995. The order is reproduced in the Appendix (App. 34).

JURISDICTION

The judgment of the Appellate Court of Illinois, Second Judicial District, which affirmed the judgment of the Circuit Court was entered on September 11,1995. Thereafter, the Illinois Supreme Court denied Petitioner's Petition for Leave to Appeal.

This Petition is being filed within 90 days of the December 6, 1995 order of

the Supreme Court of Illinois denying Leave to Appeal. The jurisdiction of this Court is invoked under 28 U.S. C.§1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides: "... nor cruel and unusual punishments inflicted."

The Sixth Amendment to the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Illinois Compiled Statutes, (1994), Chapter 730, Section 5/4-1-1:

> "5-4-1. Sentencing Hearing.
> (a)...
> (1) consider the evidence, if any, received upon the trial;
> (2) consider any presentence reports;
> (3) consider the financial impact

of incarceration based on the financial impact statement filed with the clerk of the court by the Department of Corrections;
(4) consider evidence and information offered by the parties in aggravation and mitigation;
(5) hear arguments as to sentencing alternatives;
(6) afford the defendant the opportunity to make a statement in his own behalf;...
(b) All sentences shall be imposed by the judge based upon his independent assessment of the elements specified above and any agreement as to sentence reached by the parties. The judge who presided at the trial or the judge who accepted the plea of guilty shall impose the sentence unless he is no longer sitting as a judge in that court. Where the judge does not impose sentence at the same time on all defendants who are convicted as a result of being involved in the same offense, the defendant or the State's attorney may advise the sentencing court of the disposition of any other defendants who have been sentenced. ..."

Illinois Compiled Statutes,(1994), Chapter 730, Section 5/5-5-3.1:

"5/5-5-3.1. Factors in Mitigation. (a) The following grounds shall be accorded weight in favor of wihtholding or minimizing a sentence of imprisonment:

(1) the defendant's criminal conduct neither caused nor threatened serious physical harm to another;
(2) the defendant did not contemplate that his criminal conduct would cause or threaten serious physical harm to another; ...
(8) the defendants' criminal conduct was the result of circumstances unlikely to recur;
(9) the character and attitudes of the defendant indicate that he is unlikely to commit another crime;
(10) the defendant is particularly likely to comply with the terms of a period of probation;
(11) the imprisonment of the defendant would entail excessive hardship to his dependents; ...
(b) If the court, having due regard for the character of the offender, the nature and circumstances of the offense and the public interest finds that a sentence of imprisonment is the most appropriate disposition of the offender, or where other provisions of this Code mandate the imprisonment of the offender, the grounds listed in paragraph (a) of this subsection shall be considered as factors in mitigation of the term imposed."

STATEMENT OF THE CASE

Petitioner, Robert Trujillo, was charged by indictment with 2 counts of Aggravated Criminal Sexual Assault, alleging various forms of oral sexual activity with the Complaining Witness.(R C9-10) A jury trial commenced on July 13, 1993, and concluded on July 15, 1993. Petitioner was convicted of 2 counts of Aggravated Criminal Sexual Assault. He also pleaded guilty to a bail bond violation. Post-Trial Motions were denied. Petitioner was sentenced to a term of 15 years for the offense of Aggravated Criminal Sexual Assault and 8 years for Bail Bond Violation in the Department of Corrections.(R 717)

On trial date (continued from the previous week), the Defense Counsel asked for a continuance, as he had not had sufficient opportunity to speak to Petitioner or witnesses.The Motion was denied, and the trial began that day.(R 34-35)

Complaining Witness, NS, age 8, said they lived next door to the Trujillos for 4 years. She spent the night before they went to the zoo at the Trujillos' and she

and Petitioner's daughter, Lisa, slept on the floor in the downstairs living room. Lisa's mom was not home but her father was. He was on the couch when the phone rang; knew she was awake and asked if he could kiss her. Thinking it was a good night kiss she said "Yeah". He lifted her nightgown and pulled down her underwear. He licked her 'private' with his tongue. He was face down with his head inside her legs. He stopped when she told him to. He told her not to tell anyone because he would get in trouble. He went back on the couch and she went to sleep. NS testified that the next day they ate breakfast and went to her house and then to the zoo.(R 206-215)

She told her mom approximately 10 months later because when she called up Lisa, Petitioner answered and said he wanted her to spend the night. She hung up and told her mom. The next day they told the police. She didn't tell right away because she was scared. The zoo was after her July 15 birthday. After that night, she stayed at Lisa's house maybe ..."3 or 2 more times". Most of the time Lisa's mother was not home but Petitioner

was.(R 216-229)

When asked if she has ever told lies before, she answered, "Yeah".(R 217)

Her mother testified and corroborated her version. (R 150-161, 244-248)

KS said her daughter had lied to her previously.(R 162-163, 250)

Mark Pleasant, from Illinois Department of Family Services, testified NS told him substantially what she testified to in the trial.(R 164-184, 255-272)

Lydia Trujillo, Petitioner's wife, testified to a different version. She said she was always present when NS spent the night. The 2 girls would sleep on the floor in the downstairs living room.(R 303-310) She was more precise as to when they went to the zoo and said that NS did not stay the night at their house prior to going to the zoo as NS said. Her husband was never present without her being there. (R 310-312)

Lydia offered a motive as to why NS would lie about these charges. NS was mad at Lydia for not removing a Brownie leader and for not permitting NS to talk to Lisa the night that she called.(R 316-339, 324-337)

Petitioner's 8-year old daughter, Lisa, testified that on the night before they went to the zoo, Lisa spent the night at NS's home, not the other way around. She said Petitioner had never spent the night downstairs on the couch with Lisa and NS.(R 336-343)

Petitioner stated that he was a 55 year old electrician, with 9 children and 15 grandchildren. NS and Lisa were friends and NS spent many nights at their house. He said his wife was always present and he slept in his bedroom upstairs. He emphatically denied sexually abusing NS. (R 348-359)

A character witness for the Defense testified to Petitioner's good reputation in the community for truthfulness, but when asked her observation of Petitioner's interaction with children for the purpose of showing that he did not have a propensity for committing sexual acts towards children, an objection was sustained.(R 363-367)

Defense Counsel offered a new character witness whose name he had not previously given to the State and the Court prevented him from testifying.(R 370-373)

Another character witness testified that Petitioner's reputation for truth and honesty was very good but this witness was not allowed to testify as to his reputation in the community as it relates to children.(R 394-400)

While the jury was deliberating, the Petitioner took off and was not present when the verdict was returned. The Petition was found guilty of Aggravated Criminal Sexual Assault. A bench warrant was issued.(R 460-461) Petitioner was arrested on August 16, 1994 in Arizona.

Petitioner filed a Post-Trial Motion contending *inter alia* that Trial Counsel was ineffective.(R 474-476)

The Trial Court held a hearing on Petitioner's Post-Trial Motion. At the hearing, Lydia testified that she was instrumental in helping Petitioner hire Thomas Smoker as his Trial Counsel. She said she first saw Smoker at the bond hearing where they conversed briefly regarding the charges against Petitioner. (R 520-523) They met with Smoker again a few days later for about 45 minutes and discussed the case. About 2 weeks after they hired him, Lydia supplied Smoker

with a list of witnesses she thought would be helpful to the case. She said Smoker never contacted her regarding any of the witnesses, nor did he meet with either of them during the 3 months between the bond hearing and the trial. She testified that she telephoned Smoker approximately 15 times during this period, but received only one return call. (R 520-523)

Lydia said Smoker did not tell them of the trial date until he called at 10:30 P.M., the night before it was to begin. He told them to be in his office at 7 A.M. the next morning because the State had offered a plea bargain. (R 524-525) Lydia and Petitioner were able to arrange to miss work, and they went to Smoker's office the next morning at 7. He arrived 45 minutes later and told them about a plea bargain, but her husband said he was innocent and would not accept a deal. Petitioner asked about getting witnesses, subpoenaing people and the expert witnesses that Smoker had spoken of. Smoker said he wasn't ready for trial but was going to ask for a continuance. Coming out of Court, he said they were going to

trial that day. He did not discuss his trial strategy with them or prepare them to testify. (R 526-528).

The trial started hours later, but they did not talk about the case then, during or after lunch, or after Court.(R 529-530) The next day they did not talk in the morning, during or after lunch or after court. They did go out for a cigarette break.(R 531-532)

The next morning, he asked Lydia about any witnesses for Court. They could use their cousin, who had come for support, but other people were already at work. Only one could come in and she had to pick Hayner up. The first time he ever talked to them was outside the Courtroom before they went in to testify.(R 533-534)

Petitioner's testimony at the hearing was largely consistent with Lydia's. However, he admitted he saw Smoker on 2 additional occasions: the arrangement and the pre-trial, but stated that during these 2 times, Smoker "did what he had to do" and then left without discussing the case. Petitioner said Smoker seemed pretty upset when he told him he did not want to accept the State's plea bargain

offer.(R 551-564)

Thomas Smoker testified that in the 3 months between the bond hearing and the trial, he met with the Petitioner between 5 and 10 times. He doubted that Lydia called him 15 times, as he had only 4 messages in his file. He estimated that the total amount of time he spent discuss the case with Petitioner prior to trial was 2-1/2 hours. He spent an additional 1/2 to 1 hour discussing the case with Lydia.(R 580-6191)

The Post-Trial Motion was denied.(R 682) Petitioner's Motion to Reconsider his sentence was denied on October 31, 1994. (R 16A)

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONER'S SENTENCE WAS EXCESSIVE, CRUEL, AND UNUSUAL IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

From the time of his arrest on April 13, 1993, until the time of the verdict on July 15, 1993, the Petitioner, Robert

G. Trujillo, had remained free on $25,000 bond, having posted 10% of same.(C 7) Robert Trujillo is a 56 year old, United States citizen, who was born and educated in Tucson, Arizona. He is a married man with 2 minor daughters, ages 10 and 5, and 7 adult children. He has 15 grandchildren. (R 348)

In 1964, Mr. Trujillo was arrested in Arizona for Unlawful Use of Heroin and fined. In 1965, he was sentenced to the Arizona Department of Corrections for Burglary-Second Degree. In 1967, he was arrested in Arizona for Unlawful Concealment and Transportation of Heroin and sentenced in Federal Court, as an addict who was likely to be rehabilitated, to no more than 10 years for Purchasing Narcotics without a Tax Stamp. He was incarcerated in 1979 in Arizona for Unlawful Possession of Heroin, and in 1988 was sentenced to probation for Unlawful Possession of a Controlled Substance. In 1990, he successfully completed his probation. Although in 1979 and in 1988, he was arrested for Driving Under the Influence of Alcohol, he has since been ticketed only for 4 Speeding violations and 2

non-moving violations.(C 128-131)

Witnesses, who were never contacted by Petitioner's Trial Counsel, would have testified that the Complainant's reputation in the community for honesty was very bad and they would not believe her under oath and/or that Mr. Trujillo's reputation in the community for honesty, morality and morality with children was very good. The Affidavits of these witnesses have been made a part of the record herein.(C96,97,98,99,115,116,117, 118,119,120,121,122,236)

The post-trial proceedings also indicated Mr. Trujillo's refusal to accept a negotiated plea that would have offered probation.(R 528,556-557) Because he was afraid, prior to the return of the verdict, Mr. Trujillo fled to Arizona where he and his wife worked to obtain funds for a new attorney.(C 127) He was apprehended in Arizona on August 2, 1994 and extradited to Illinois.(R 474) His only violation while in the Lake County Jail was the possession of a newspaper article in his cell.(C 127)

The Trujillos moved to Illinois in 1980 to begin a new life and remove

themselves from previous poor influences which contributed to his drug addiction. Working as a backhoe operator, he became a member of the International Brotherhood of Electrical Workers in 1986.(C 134/138) Character letters offered at sentencing, expressed great love and affection for Robert Trujillo describing his life, prior to the April, 1993 accusations, as that of a hard-working, devoted and loving father, who had turned his life around completely. One niece, who is deaf, stated that Mr. Trujillo went out of his way to learn sign language in order to communicate with her. His wife, his friends and his entire family do not believe that he is guilty.(C 240)

At sentencing on October 27, 1994, the Court ordered the Robert Trujillo to serve a sentence of 15 years for the offense of Aggravated Criminal Sexual Assault and 8 years for Bail Bond Violation in the Illinois Department of Corrections.(R 717)

The Constitution of the State of Illinois, Article 1, Section 11, establishes the principle that penalties are to be determined according to the 'seri-

ousness of the offense and of restoring the offender to useful citizenship." (emphasis added). This provision is a safeguard against excessive sentences such as the one imposed here. The Eighth Amendment to the Constitution of the United States provides: "... nor cruel and unusual punishments inflicted." (*U.S. Const., Amend. VIII*)

A careful reading of the Trial Court's comments at the sentencing hearing illustrates that the Trial Court never considered the objective of restoring the Petitioner to useful citizenship. Rather, the Trial Court's objective appeared to be to punish Petitioner for deterrence sake. While the Unified Code of Corrections, Illinois Compiled Statutes, Chapter 730, Section 5/4-1-1 *et seq.* (1994) gives wide discretion to sentencing judges in imposing penalties appropriate to the particular circumstances of each case, the judge must also constitutionally impose a sentence which balances the rehabilitation potential of the offender with the need to protect society. In the instant case, this was not done. The Trial Court, in imposing the 23 year sen-

tence, focused only upon the deterrent factor. Upon sentencing, the Trial Court stated, "I have considered the Defendant's age, that being 55 years old and the lack of any prior criminal records within the last 15 years of any significance." (R 715) However, the Court then went on to talk about only deterrents and no where mentioned anything about Petitioner's long range potential for rehabilitation. Here the record clearly demonstrates the Trial Court's failure to make findings as to the various statutory sentencing factors in derogation of Section 5/5-5-3.1, Chapter 730, (Illinois Compiled Statutes, 1994).

In *People v Colone*, 56 IllApp.3d 1018, 372 NE 2d 871(1st Dist 1978), the Court reduced an armed robbery sentence from 8 to 20 years to a minimum term of 4 years. The Court said that the presence of various factors led it to conclude that ta reduction was proper. The Court was particularly impressed with the absence of any substantial criminal offense in the defendant's background. In *People v Hart*, 132 IllApp2d 558, 563, 270 NE2d 102

(2d Dist 1971), this Court stated that the criminal record of a defendant is always relevant in fixing a sentence. In *People v Nelson*, 106 IllApp3d 838, 436 NE2d 655 (1st Dist 1982), the Court declared a term of 20 years for armed robbery to be excessive and accordingly reduced it to a term of 10 years. The Court said at page 636, "**Most important, perhaps, we believe that defendants in this case have rehabilitative potential that would not be well served by the length of their sentences.** (emphasis added)".

In *People v Gibbs*, 49 IllApp3d 644, 364 NE2d 491(1st Dist 1977),the Court stated that, pursuant to the Illinois Constitution, rehabilitation must not only be considered as a factor in determining a proper sentence, but it must actually be one objective of a sentence. The court said that each case must be considered separately for its response to the constitutional mandate and that "...the nature and circumstances of the offense and the history and character of the defendant will be the governing factors." 49 IllApp3d 644, 649, 364 NE2d 491.

In *People v Treadway*, 138 IllApp3d 899,496 NE2d 929 (2d Dist 1985),the Court reduced a 60 year sentence for armed violence to a term of 30 years even though the Trial Court said that the defendant's conduct was heinous, brutal, and indicative of wanton cruelty. The Court said at page 400, "We must look beyond the court's findings, however, to examine defendant's potential for rehabilitation ... Significantly, prior to the instant conviction, he had only a minor criminal history." On page 401, The Court further said "We believe that the defendant has rehabilitative potential that would be poorly served by such a long sentence."

A reduced sentence, one which allows hope for a return to society at an age that does not preclude expectation, is appropriate here. Twenty-three years is an abuse of discretion and of the Petitioner's life, and in light of Robert Trujillo's age can be construed as a "life sentence". A reduced sentence would allow for the protection of society, act as a deterrent, and would not deprecate the seriousness of the offense. It would also allow for the rehabilita-

tion of the Petitioner, giving him a chance to be restored to society with at least the possibility of the opportunity for a normal, meaningful life.

II.

THE PETITIONER WAS UNFAIRLY PREJUDICED AND DENIED THE RIGHT TO A FAIR TRIAL WHERE THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In determining whether a defendant has received the effective assistance of counsel, guaranteed by the Sixth Amendment to the Constitution of the United States, this Honorable Court set out a 2-part test. *Strickland v Washington*, 466 US 668, 104 SCt 2052, 80 LEd2d 674 (1984). To determine whether a defendant has received the effective assistance of counsel guaranteed by the sixth amendment to the Constitution of the United States, a defendant claiming ineffective assistance of counsel must show that the advice of counsel fell outside the " 'range of competence demanded of attorneys in criminal cases' " and that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 US at 687, 694, 104 SCt at 2064, 2068, 80 LEd2d at 693, 698.

The Illinois Supreme Court adopted this 2-part standard in *People v Albanese* 104 Ill2d 504, 85 IllDec 441, 473 NE2d 1246 (1984).

As to the first element of the standard, there is a strong presumption that the challenged action of counsel was the product of sound trial strategy and not incompetence. *People v Barrow,* 139 IllDec 728, 549 NE2d 240 (1989).

While this argument is often made and is anticipated in this case, it is submitted that the errors of omission and commission attributed to Trial Counsel amount to a lack of diligence rather than an exercise of judgment. Thus, it is submitted that incompetency has been established. *Evitts v Lucey,* 469 US 387, 105 SCt 830, 83 LEd2d 821 (1985). It is submitted that in this case there has been an abdication rather than an exercise of professional judgment.

In this case, Trial Counsel never spoke with any potential witnesses, although he had their names for over 2-1/2 months (R 535,539,550). The following potential witnesses were never interviewed by Trial Counsel before testifying and/or were never called to testify on behalf of the Petitioner, although these witnesses were available and could have testified had they been contacted by Trial Counsel:

Sandra Lloyd: Could have testified that N.S.'s reputation for truth, honesty and veracity was bad;

Norma Trujillo: Could have testified that N.S.'s reputation for truth, honesty and veracity was bad; and could have testified that Robert Trujillo's reputation for truth, honesty and veracity was very good; that Robert Trujillo's reputation for chastity and morality was very good; that Robert Trujillo's reputation for sexual morality around children was very good;

Tracy Geisler, Everette Foxx and Lowell Nausbaum: Could have testified that Robert Trujillo's reputation for truth, honesty and veracity was very

good; that Robert Trujillo's reputation for chastity and morality was very good; that Robert Trujillo's reputation for sexual morality around children was very good;

Gene Temple: Could have testified that Robert Trujillo's reputation for truth, honesty and veracity was very good; that Robert Trujillo's reputation for chastity and morality was very good.

The Affidavits of the foregoing people were made a part of the record herein in Post-Trial proceedings.(R C 096,97,98,99, 115,116,117,118,119,120,121,122,236). Likewise, the names of potential witnesses were never supplied to the State.(R 34,370-371) The Sixth Amendment to the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."(*U.S. Const., Amend. VI*)

Robert and Lydia Trujillo testified that Trial Counsel did not speak to the Petitioner or his wife or his daughter about their testimony prior to their

taking the stand. (R 524-533,548,550, 551-564). On Direct testimony, Robert Trujillo, Lisa Trujillo and Lydia Trujillo testified strongly in response to questions put to them by Trial Counsel. However, each of them on Cross-Examination testified in contradiction to their direct testimony in answers to questions put to them by the State's Attorney when he confronted each of them with prior inconsistent statements. (Lydia Trujillo:R 324-328; Lisa Trujillo: R 345-346; Robert Trujillo:R 354-358) It is apparent from a reading of the Direct and Cross-Examination of these witnesses that they were not adequately prepared by Defense Counsel with respect to their prior inconsistent statements. This had to have had an adverse effect on the jury to the prejudice of the Petitioner.

He did not ask Petitioner for witnesses until the last day of trial, when many were not available. He did not speak to those that Petitioner could contact prior to their taking the stand. (R 533-534, 550) Trial Counsel testified that he estimated that he spent 2-1/2 hours discussing the preparation of this case

with Petitioner.(R 615) He estimated that he returned 2 phone calls and that they would have lasted a 1/2 hour to an hour. (R 617) He stated that he saw the Petitioner more than 5 times but less than 10 times and that included routine court appearances.(R 614) Petitioner testified that at these court appearances, Trial Counsel was "kind of in a hurry" and did not discuss the case with him. (R 554)

Trial Counsel did not contact the Petitioner until 10 o'clock or later, the night before the trial began.(R 525, 554,617). At this point a bench warrant had issued since the trial was to have begun that day. Trial Counsel told Petitioner about a plea bargain and was upset because Petitioner would not accept the negotiation. Counsel was not ready for trial and could not get another postponement.(R 34,554,555,556,557)

Trial Counsel was not able to ask a witness, Christy Hayner, about a crucial problem the Petitioner's wife had with the Complaining Witness because he had not asked Petitioner's wife about her conversation with Christy Hayner during

her Direct-Examination and he did not recall her to the stand.(R 316-317,390-392)

During the State's Rebuttal case, Defense Trial Counsel attempted to ask Investigator, Mark Pleasant, about a conversation wherein Mark Pleasant told the Petitioner, Robert Trujillo. that it was his personal belief that Petitioner was not a child molester. The Court sustained an objection to this line of inquiry because it was outside the scope of Direct Examination.(R 412) Defense Counsel should have called Investigator, Mark Pleasant during the Defense's case and asked him about that conversation. Furthermore, Defense Counsel could have easily qualified Investigator Mark Pleasant as a Expert Witness to give opinion testimony as to child molesters and the Petitioner's propensity therefore. After the State closed its rebuttal, Defense Counsel could have asked to reopen proofs to pursue this line of inquiry. He did not.

Defense Counsel attempted to ask Norma Trujillo a question regarding Petitioner's interaction with children for the

purpose of showing that he did not have a propensity for committing sexual acts on children. The Court sustained an objection by the State and Counsel did nothing further to get this matter before the Jury.(R 366-367)

Counsel asked no questions regarding Petitioner's reputation for chastity and morality even though Norma Trujillo, Tracy Geisler, Everette Foxx, and Lowell Nausbaum were able to testify to this and were available to testify if they had been contacted by Counsel.(R C 096,97,98, 99,115,116,117,118,119,120,121,122,236)

Tracy Geisler testified that Petitioner's reputation for truth and honesty was very good.(R 394-397) The Defense then approached the Bench and stated, "I want to ask her about his reputation in the community as it relates to children as she has specific knowledge of that, she has knowledge of his reputation in the community as it relates to his interaction with children, and she can testify to it."(R 398) Later the Court responded, "I am not aware of any authority that allows you to do that, and just like you can't introduce propensities to commit a

crime, even if he introduces a prior conviction, there is an instruction limiting that to his truthfulness, to his propensity to commit a crime. I am not aware of any authority that allows you to do that, Mr. Smoker. If you've got some authority."(R 399) Counsel should have pursued this, especially in a case where morality and chastity were very important reputation characteristics.

In this case there were only 2 eye witnesses, namely the Petitioner and the Complaining Witness. The Complaining Witness testified that something happened and the Petitioner denied it. Therefore, it became a credibility contest and Trial Counsel should have presented testimony as to Petitioner's good reputation for truth and the Complaining Witness' bad reputation for truth; and Petitioner's good reputation for chastity and morality, especially with children.

Had this evidence been presented there is a great probability that there would have been a different result in the trial.

Trial Counsel supplied no instructions to the jury (R 376-377) and did not offer

any when the Court, after reading the instructions to the Jury, asked Counsel to approach the bench and asked if there were any other instructions. (R 455)

It is submitted, once again, that in this case there has been an abdication rather than an exercise of professional judgment and falls within the 2-part test set out by this Honorable Court in *Strickland v Washington, Supra.*

CONCLUSION

Wherefore, Petitioner, ROBERT G. TRUJILLO, respectfully prays that a writ of certiorari issue to the Supreme Court of Illinois.

Respectfully submitted,

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APPENDIX

Opinion of the
Appellate Court of Illinois
Second Judicial District
No. 2-95-0192 --
Filed September 11, 1995

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

ROBERT G. TRUJILLO,

Defendant-Appellant.

JUSTICE BOWMAN delivered the opinion of the court:

Defendant, Robert Trujillo, was convicted by a jury of aggravated criminal sexual assault (720 ILCS 5/112-14(b)(1) (West 1992)) and sentenced to 15 years' imprisonment. Defendant now appeals his conviction and sentence.

Because the parties are familiar with the evidence adduced at trial, we summarize only those facts necessary to resolve the issues raised on appeal. Complainant, N.S., was born on July 15, 1984, and was almost nine years old at the time of the trial. In 1992, when defendant allegedly assaulted her, she

lived in Grayslake with her mother and brother, next door to the Trujillo residence. N.S. and defendant's daughter. Lisa Trujillo, are approximately the same age and were close friends.

At trial, N.S. testified that the alleged assault occurred one night when she slept over at the Trujillo residence. According to N.S., Lisa's mother was not home on the night in question, but defendant was there. After spending the evening playing outside in the yard, N.S. and Lisa fell asleep watching movies in the Trujillos' living room. N.S. testified that at some point during the night, the telephone rang and defendant, who had been sleeping on the couch in the living room, got up to answer it. After answering the phone, he asked N.S. if he could kiss her good night. Thinking this meant a kiss on the cheek, N.S. said yes. Defendant then proceeded to lift up her nightgown and pull down her panties. He then put his head between her legs, placed his mouth on her vagina, and licked it. N.S. asked defendant to stop and he complied. He the told her not to tell her mother or Lisa what had happened. N.S. went back to sleep.

At trial, N.S. could not recall the day or month when the alleged assault occurred. However, she associated it with a trip to the zoo that she took with her family and Lisa the next day. N.S. stated that the zoo trip took place after her eighth birthday, which was July 15, 1992. N.S. explained that she did not tell her mother about the alleged incident until several months after it happened because she was scared and embarrassed. N.S. admitted that in the months following the alleged incident, she spent the night at the Trujillo residence two or three times.

N.S.'s mother, K.S., testified at trial pursuant to section 115-10 of the Code of Criminal Procedure (725 ILCS 5-115-10 (West 1994). K.S. stated that on April 7, 1993 she was at home with her son and N.S. According to K.S., N.S. had called the Trujillo residence to speak to Lisa. After she hung up the phone, N.S. told her mother that defendant said he wanted N.S. to spend the night there. N.s. said that she did not want to. When K.S. asked her why, she said something bad had happened to her there and she was afraid to spend the night. N.S.then

described the incident which had allegedly occurred at the Trujillo residence several months earlier. The details of the alleged assault, as related by N.S. to her mother, were essentially consistent with N.S.'s trial testimony. The next morning, K.S.\took N.S. to the police station to report what had happened.

Investigator Mark Pleasant of the Department of Children and Family Services also testified pursuant to Section 115-10 (725 ILCS 5/115-10 (West 1994). Pleasant stated that after being contacted by the Grayslake police department, he interviewed N.S. regarding the alleged assault. N.S.'s account of the incident, as conveyed to Pleasant, was essentially consistent with N.S.'s trial testimony. Pleasant stated that, as part of his investigation, he gave N.S. an anatomically correct drawing of a female child and asked her to draw a circle around the body part that defendant had licked. N.S. drew a circle around the vagina. According to Pleasant, N.S. estimated that defendant had licked her vagina for five to ten minutes.

Lydia Trujillo (Lydia), defendant's

wife, testified that on every occasion that N.S. spent the night at the Trujillo residence she was present. According to Lydia, the trip to the zoo to which N.S. referred occurred in early June, 1992. She further stated that on the night before the zoo trip, Lisa and N.S. spent the night at N.S.'s house. Lydia testified that after the zoo trip N.S. spent the night at the Trujillo residence approximately ten times and that she was present on each of these occasions. Lydia also stated that she was the leader of the Brownie troop of which N.S and Lisa were members. Lydia said that she had a verbal confrontation with N.S. on April 7, 1993, the same day that N.S. reported the alleged assault to her mother, According to Lydia, N.S. was part of a clique of girls within the troop who did not like Christine Hayner, an assistant Brownie leader in the troop. Lydia explained that the confrontation occurred because she refused to dismiss Hayner from her assistant leader position.

Defendant also testified at trial. He stated that he could not recall any time that N.S. spent the night when Lydia was

not present. He further stated that on the night before the June 1992 trip to the zoo, Lisa and N.S. spent the night at N.S.'s house. Finally, defendant denied that the assault described by N.S. ever occurred.

The defense also called two character witnesses: Norma Trujillo and Tracy Geisler. Norma Trujillo, who is defendant's sister-in-law, testified that defendant had a good reputation in the community for honesty. Tracy Geisler, who is also related to defendant by marriage, testified similarly that defendant reputation in the community for honesty was good.

After hearing the above testimony, as well as that several other witnesses, the jury found defendant guilty of aggravated criminal sexual assault. Defendant, however, failed to appear when the jury returned from its deliberations, and defense counsel told the trial court he did not know defendant's whereabouts. The trial court proceeded to enter judgment on the guilty verdict and issue a bench warrant for defendant's arrest. Approximately one year after judgment was entered, the trial court was informed

that defendant had been arrested in Arizona and returned to Illinois. Shortly thereafter, defendant's trial counsel, Thomas Smoker withdrew from representing him. Defendant's present counsel, Robert P. Will, Jr., then entered his appearance. Represented by Will, defendant filed a post-trial motion for a judgment notwithstanding the verdict or a new trial, contending, *inter alia*, that trial counsel was ineffective.

The trial court held a hearing on defendant's post-trial motion. At the hearing, Lydia Trujillo testified that she was instrumental in helping defendant hire Smoker as his trial counsel. She stated that she first saw smoker at the bond hearing where they conversed briefly regarding the charges against defendant. Lydia, defendant, and Smoker met again a few days later for about 45 minutes and discussed the case. About two weeks after the hired Smoker, she supplied him with a list of character witnesses she thought would be helpful to the case. According to Lydia, Smoker never contacted her regarding any of the witnesses. In fact, Lydia testified, during the approximately three months between the

bond hearing and the trial, neither she nor defendant met with Smoker at all. She further testified that she telephoned Smoker approximately 15 times during this period but that he returned only one call.

According to Lydia, Smoker did not inform them of the trial date until the night before the trial was scheduled to begin. She stated that Smoker called them at around 10:30 p.m.the evening before trial and instructed them to be in his office at 7:00 a.m. the next morning because the State had offered a plea bargain. Both defendant and Lydia were able to arrange to miss work the next day, and they appeared as requested at 7:00. Around 7:45, Smoker arrived and proceeded to outline a plea bargain offered by the State. Defendant said that he was innocent and did not want to accept the deal.. Smoker replied that he was not ready for trial and said he would try to get a continuance. They then accompanied Smoker to court. Once there, Smoker requested a continuance which the trial court denied.

After the trial court denied Smoker's request for a continuance, the trial

began. According to Lydia, Smoker still has not discussed his trial strategy with defendant or Lydia, or prepared them to testify. During the lunch break on the first day of trial, Smoker went out to lunch alone and did not discuss the case with defendant or Lydia. Nor did he discuss the case with them at the end of the day, other than to instruct them to be at his office at 8:30 the following morning.

Lydia testified that on the second day of trial, Smoker did not speak to defendant or her except for a five or ten minute conversation during a break in testimony. At the end of the day, they went home and Smoker did not attempt to contact them that evening. When they appeared at Smoker's office the next morning, he asked them if they knew anyone who could come to court that day to testify. According to Lydia, this was the first time Smoker had inquired about witnesses. Lydia tried to call a number of people, but many were at work and could not leave on short notice. She was able to persuade Norma Trujillo, Christine Hayner, and Tracy Geisler to testify. When these witnesses arrived, Smoker

spoke to each of them briefly in the corridor outside the courtroom. This was his only contact with these witnesses.

Defendant also testified at the hearing. His testimony was largely consistent with Lydia's. He admitted, however, that he had seen Smoker on two additional occasions: the arraignment and the pre-trial, but stated that in each of these instances, Smoker "did what he had to do" in court and the left without discussing the case. Defendant stated that when he informed Smoker that he did not want to accept the State's plea bargain offer, Smoker seemed upset.

Smoker also testified at the hearing. He stated that in the approximately three months between the bond hearing and trial, he met with defendant between five and ten times. He denied that Lydia had called his office 15 times, and noted that there were only four messages from her in the file. Smoker estimated that the total amount of time he spent discussing the case with the defendant prior to trial was two and one-half hours. He stated that he spent an additional one-half to one-hour discussing the case with Lydia.

Following the presentation of the above evidence and arguments from counsel, the trial court denied defendant's post-trial motion. This timely appeal followed. On appeal, defendant contends: (1) the failure of his trial counsel to properly prepare for trial denied him the effective assistance of counsel; (2) the evidence failed to prove him guilty beyond a reasonable doubt; and (3) his sentence of 15 years is excessive and unreasonable.

Defendant's first contention is that attorney Smoker's failure to contact any of the individuals on the list of witnesses provided by Lydia, his failure to properly prepare the witnesses who did testify, and his general lack of trial preparation and inattention to the case deprived defendant of the effective assistance of counsel. According to defendant, none of these alleged lapses can be characterized as tactical decisions and the record as a whole demonstrates "a [*sic*] abdication rather than an exercise of professional judgment."

The sixth amendment to the United States Constitution, applied to the states through the fourteenth amendment,

guarantees and accused the right to the assistance of counsel. (U.S. Const., amends. VI, XIV: Strickland v. Washington (1984),466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052; People v. Albanese (1984), 104 Ill. 2d 504 (adopting Strickland).) The right to counsel is, in practice, the right to the effective assistance of counsel. (Strickland, 466 U.S. at 688, 80 L. Ed. 2d at ____, 104 S. Ct. at 2063.) To prevail on a claim of ineffective assistance of counsel, however, a defendant bears a heavy burden. (See People v Holman (1995), _____ Ill. 2d _____, 647 N.E.2d 960, 966.) He must show that his attorney's representation fell below an objective standard of reasonableness, as measured by reference to prevailing professional norms, and that the substandard representation was so prejudicial it denied him a fair trial. (Strickland, 466 U.S. at 687-88, 80 L. Ed. 2d at ____, 104 S. Ct. at 2064-65.) A defendant's failure to make a requisite showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim. Strickland, 466 U.S. at 687, 80 L. Ed 2d at ___, 104 S. Ct. at 2064.

Effective assistance of counsel refers to competent, not perfect representation. (People v Odle (1992), 151 Ill. 2d 168, 173.) The Supreme Court has observed that "[w]here a true adversarial criminal trial has been conducted -- even if defense counsel may have made demonstrable errors -- the kind of testing envisioned by the Sixth Amendment has occurred." (United States v Cronic (1984), 466 U.S. 648, 80 L Ed. 2d 657,666, 104 S. Ct. 2039, 2045.) There is a strong presumption that counsel's performance fell with the wide range of reasonable professional assistance. (Strickland, 466 U.S. at 680, 80 L. Ed. 2d at ___, 104 S. Ct. at 2066.) Counsel's competence is determined from the totality of his representation of the defendant and not from isolated incidents. (People v Smith (1992), 231 Ill. App. 3d 584, 594.) In all cases, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686, 80 L. Ed. 2d at _____, 104 S. Ct. at 2064.

In support of his ineffective assistance claim, defendant launches a broad attack against virtually all aspects of Smoker's representation of him at trial. However, before we turn to the merits of this argument, we must point out that many of defendant's criticisms of Smoker's performance are plainly without merit. Some of these criticisms take Smoker to task for failing to present evidence which is patently inadmissible, such as "expert" testimony that defendant did not have the propensity to molest children. Other points condemn Smoker for failing to present evidence which the record indicates he did in fact present, such as testimony from Norma Trujillo and Tracy Geisler regarding defendant's good reputation for honesty. Finally, we note that defendant's ineffective assistance argument includes minimal citation to authority. Defendant argues that Smoker's decision not to present the testimony of numerous witnesses was objectively unreasonable, but does not cite authority to demonstrate that their testimony would have been properly admissible had it been offered. Conclusory arguments such as these violate Supreme Court Rule 341(e)

(7) (134 Ill. 2d R. 341(e) (7)0, and result in waiver. Thus, where defendant's allegations of ineffective assistance are based on the failure to present evidence, they are deemed waived would have been admissible. See, e.g., People V Williams (1994), 267 Ill. App. 3d 82, 86 (failure to cite relevant authority in support of contentions results in waiver).

Defendant's remaining allegation of ineffective assistance concern (1) Smoker's failure to call certain witnesses to testify; (2) Smoker's failure to elicit certain testimony from witnesses called; and (3) Smoker's general failure to properly prepare for trial, including the failure to sufficiently investigate the facts, to discuss the case with defendant and Lydia, and to properly prepare witnesses for their testimony.

Defendant's first allegation is that Smoker should have called Sandra Lloyd, formerly an assistant leader of the Brownie troop in which N.S. was a member, to testify that N.S.'s reputation for

honesty was poor.[1] According to defendant, Smoker was aware of Sandra Lloyd's existence, she was available to testify, and failing to call her to testify is not attributable to trial strategy.

The failure to present available witness may, in certain circumstances, constitute ineffective assistance of counsel. (See People v. Kluppelberg (1993), 257 Ill. App 3d 516, 527; People V. Gunartt (1991), 218 Ill. App. 3d 752, 762.) This is particularly true where counsel knows of the witnesses. (People V Bell (1987), 152 Ill. App. 3d 1007, 1012.) However, the degree of investigation counsel must undertake is often determined by the amount of information provided by his client. As the Supreme Court has stated:

"The reasonableness of counsel's actions my be determined or substantially influenced by the defendant's own statements or action *** [and] when the facts that support a certain potential line of defense are generally known to counsel

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[1] Evidence of a witness' reputation for truthfulness is admissible, even where the witness is a child. See People v West (1994), 158 Ill. 2d 155, 162.

because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether." Strickland, 466 U.S. at 691, 80 L. Ed. 2d at ___, 104 S. Ct. at 2066.

As the above quotation from Strickland suggests, where, as here, a defendant provided his counsel with an extensive list of potential character witnesses, counsel's duty to seek out character witnesses other than named on the list is lessened. Our review of the record indicated that Lloyd's name was not among those given to Smoker by Lydia prior to trial, and neither defendant nor Lydia informed Smoker by other means that Lloyd was a potential witness prior to trial. Thus, without engaging in an extensive search for character witnesses to supplement those provided, Smoker could not have discovered Lloyd's existence. Under these circumstances we hold that Smoker's decision not to seek out witnesses beyond those named on the, list falls within the wide range of reasonable professional assistance. See Strickland, 466 U.S. at 689, 80 L. Ed. 2d at _____, 104 S. Ct. at 2065; see also

People v. Kubat (1986), 114 Ill. 2d 424, 433 ("[t]he failure to find a witness, Per se, cannot constitute ineffective assistance of counsel"); United States ex. rel. Kleba v. McGinnis (7th Cir. 1986), 796 F.2d 947, 957-58 (refusing to use hindsight to second guess counsel's legitimate tactical decision not to search for a potential witness that his client never informed him of prior to trial).

Defendant next argues that Smoker should have called Gene Temple, one of defendant's co-workers, and Lowell Nusbaum, and acquaintance of defendant and 12 years, to testify to defendant's reputation for honesty and morality.[2] Smoker testimony at the hearing indicates he was not informed that Temple and Nusbaum were potential character witnesses prior to the trial.

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[2] Evidence regarding a testifying defendant reputation for honesty is generally admissible. (See People v Barmlett (1985), 131 Ill. App. 3d 616, 619; see also E. Cleary & M. Graham, Handbook of Illinois Evidence S608.2, at 406 (6th ed. 1994).) pertaining to defendant's reputation for morality would have been admissible. See People v Schuldt (1991), 217 Ill. App. 3d 534, 543.

According to Smoker's testimony, neither Temple nor Nusbaum appeared on the list of witnesses given him by Lydia. As we stated above regarding Lloyd, Smoker's failure to call Temple and Nusbaum as witnesses is attributable to the fact that defendant did not inform Smoker of their existence prior to trial, and therefore does not constitute ineffective assistance of counsel. See Strickland, 466 U.S. as 691, 80 L. Ed. 2d at _____, 104 S. Ct. at 2066.

Defendant's next allegation is that Smoker's failure to present the testimony of Everette Foxx, defendant's former landlord, regarding his reputation for honesty and morality, constituted ineffective assistance. Foxx, unlike the witness discussed above, was on the list given to Smoker by Lydia. Smoker testified at the hearing that he "would have liked to have had Mr. Foxx [testify]" but Foxx was out of State and unavailable at the time of trial. Smoker further stated that he believed Foxx's testimony would have been substantially duplicative of the character testimony given by Norma Trujillo and Tracy Geisler and that "[a]t some point it reaches a point of diminishing re-

turns."

We accept this explanation. Generally, a defense counsel's decision not to call a particular witness is a question of trial strategy and should not be second-guessed by a reviewing court. (see People v Goodloe (1994), 263 Ill. App. 3d 1060, 1073; People v Spicer (1987), 163 Ill. App. 3d 81, 93.) Moreover, the failure to offer cumulative evidence cannot support a claim of ineffective assistance. (See People v Nevitt (1990), 135 Ill. 2d 423, 461.) The record confirms that the portion of Foxx's testimony concerning defendant's reputation of honesty would have been cumulative of Norma Trujillo's and Tracy Geisler's testimony. As to the portion of Foxx's proposed testimony which concerned defendant's reputation for morality, we cannot say that Smoker's decision to forego presentation of this evidence was objectively unreasonable without engaging in an improper hindsight analysis of counsel's conduct. (See Strickland, 466 U.S. at 689, 80 L. Ed. 2d at ____, 104 S. Ct. at 2065.) Moreover, even if we were to find unreasonable Smoker's explanation of his decision not

to subpoena Foxx, we cannot say that the absence of this evidence, considered in light of the record as a whole, undermines our confidence in the trial's outcome. See Strickland, 466 U.S. at 694,80 L. Ed. 2d at ____, 104 S. Ct. at 2068.

Defendant's next allegation of ineffective assistance concerns Smoker's failure to elicit testimony from Norma Trujillo and Tracey Geisler regarding N.S.'s reputation for honesty. Although these witnesses did testify regarding defendant's good reputation for honesty, Smoker elected not to question them regarding N.S.'s reputation. At the hearing, Smoker characterized his decision not to address N.S.'s reputation with these witnesses as a tactical one. He explained that, in his judgment, a defense attorney should not call relatives of the accused to testify to the reputation of the alleged victim.

We see no persuasive reason to question Smoker's Judgement on this issue. As the Supreme Court has noted, "[j]udicial scrutiny of counsel's performance must be highly deferential." (Strickland,466 U.S. at 689, 80 L. Ed. 2d

at ____, 104 S. Ct. at 2065; see also People v Patten (1992), 240 Ill. App. 3d 407, 413-14.) Strategic choices regarding how to present a defense, made after investigating the law and facts, are virtually unchallengeable. (See Strickland, 466 U.S. at 690-91, 80 L. Ed. 2d at ____, 104 S. Ct. at 2066.) Smoker's explanation that is it not advisable, in his experience, to elicit victim's reputation is not facially implausible. In short, the decision not to question Norma Trujillo and Tracey Geisler regarding N.S.'s reputation for honesty is the type of tactical decision which Strickland and its progeny admonish us not to second-guess. See Strickland, 466 U.S. at 690-91, 80 L. Ed. 2d at ____, 104 S. Ct. at 2066; People v SMith (1992), 231 Ill. App. 3d 584, 594-95.

In his final, and broadest, allegation of ineffective assistance, defendant ar-gues that Smoker failed to adequately prepare for and properly try the case and that the cumulative effect of Smoker's poor trial preparation denied him that effective assistance of counsel. Specifically, defendant asserts Smoker's trial preparation was inadequate because: (1)

Smoker admitted that during the approximately three months between the bail hearing and the trial, he spent a total of 2 1/2 hours discussing the case with defendant; (2) Smoker spent only a few minutes in the corridor outside the courtroom preparing the witnesses who testified for their anticipated testimony; and (3) Smoker failed adequately to discuss the case with defendant during the trial.

It is true that an accumulation of errors by counsel can prejudice a defendant's case so seriously as to require reversal even when none of the errors, viewed in isolation, creates such prejudice. (See People v Lee (1989), 185 Ill. App. 3d 420, 446.) However, the overall quality of Smoker's representation of defendant was not so substandard as to warrant reversal.

Smoker's candid admission that he spent only 2 1/2 hours over a period of nearly three months that he spent only 2 1/2 hours over a period of nearly three months discussing the case with defendant is disturbing. We are likewise troubled by Smoker's statement to defendant and Lydia on the morning of trial that he was

not prepared for trial. Further, it seems odd that Smoker did not take advantage of the lunch breaks and evenings during the trial to meet with defendant. Yet, as courts have cautioned, the degree of pretrial preparation undertaken by counsel is only relevant to an ineffectiveness claim insofar as it affects counsel's actual performance at trial. See People v McVay (1988), 170 Ill. App. 3d 443, 453 (finding no ineffective assistance where counsel made every effort at trial to compensate for his initial lack of diligence); Henderson v Thieret (7th Cir. 1988), 859 F. 2d 492, 499 (holding that mere lack of preparation does not constitute ineffective assistance of counsel absent a showing of prejudice); Kleba, 796 F.2d at 954 (stating that the focus of the sixth amendment is on performance, not on the amount of counsel's preparation prior to trial or his state of mind).

After reviewing the record in detail, we are satisfied that Smoker's defense was adequate, despite the minimal amount of time he spent with defendant in preparation to try the case. First, we note that Smoker's meetings with defen-

dant prior to trial, though infrequent, did not constitute the entirety of his trial preparation. He testified at the hearing on defendant's post- trial motion that he spent additional time reviewing the State's discovery materials, case law, statutory law, preparing his direct examinations, reviewing jury instructions, and preparing opening and closing statements.

Second, Smoker conducted the trial in a reasonably competent manner. His opening statement, though brief, focused the jury on the importance of the presumption of innocence; his closing argument effectively highlighted what he believed to be the weakness in the State's case; and is direct and cross-examinations of witnesses were generally effective and organized. For example, Smoker elicited a number of important admissions from N.S. during her cross- examination. He established that she was unsure as to the day and month when the alleged occurred; that her recollection of the layout of the Trujillos' living room was faulty; that she had told lies in the past; that she continued to visit the Trujillo residence after the alleged assault; and

that she did not report the alleged assault until months after it happened.

Our conclusion that Smoker's performance, viewed in its entirety, was reasonably effective is supported by a review of recent case law in which courts have found ineffective assistance. See, e.g., People v. Coleman (1994), 267 Ill. App. 3d 895 (counsel conducted no pretrial investigation whatsoever; failed to locate five alibi witnesses known to him; trial judge stated defendant "would have been better off with his mother defending him"); People v. Kozlowski (1994), 266 Ill. App. 3d 595 (counsel completely misapprehended the relevant law; failed to object to a single prosecution question; and was admonished by trial court that eh was permitting State to introduce hearsay testimony); People v. Salgado (1994), 263 Ill. App. 3d 238 (counsel completely failed to impeach State's sole eyewitness although significant impeachment was available); People v. Bonslater (1994), 261 Ill. App. 3d 432 (counsel made no opening statement; failed to cross-examine State's only witness; made a factually insupportable closing argument; and demonstrated gross ignorance of

the law); People v. Mejia (1193), 247 Ill. App. 3d 55 (counsel failed to call witness he said in opening statement would corroborate defendant's testimony; stipulated to facts of police reports which clearly contradicted testimony of State's witnesses); People v. Tillman (1991), 226 Ill. App. 3d 1 (counsel failed to interview known alibi witnesses; failed to object to evidence to irrelevant and prejudicial evidence; failed to object to evidence not disclosed by State prior to trial; failed to object to defendant's inculpatory statement to police). The overall quality of Smoker's representation to defendant in the present case was significantly superior to the representation provided to the defendants in the above cases. The defense attorneys in each of the above cases committed crucial errors and failed to subject the State's case to meaningful adversarial testing, resulting in grave unfairness to their clients. By contrast, Smoker was a zealous and generally effective advocate who mounted a credible defense.

In sum, although defendant has pointed out numerous aspects of Smoker's

pretrial preparation and conduct during trial that could be improved upon, the record as a whole belies defendant's contention that he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment *** [and] that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (Strickland, 466 U.S. at 687, 80 L. Ed. 2d at ____, 104 S. Ct. at 2064.) As one court has aptly noted, "[i]nvariably the lawyer who refights a campaign on the written record finds ways to fight it better." (Commonwealth v. Melchionno (Mass. App. Ct. 1990), 558 N.E.2d 18, 20.) recognizing that the sixth amendment guarantees a competent defense, not a perfect defense, we hold that defendant received reasonably competent representation. See Odle, 151 Ill. 2d at 173; see also People v. Humphries (1994), 257 Ill. App. 3d 1034, 1046 (to succeed on ineffective assistance claim defendant must establish that counsel's decision were "so utterly deficient as to cause a deprivation of the right to a fair trial").

Defendant's second principal contention on appeal is that the evidence adduced at trial is insufficient to prove him guilty beyond a reasonable doubt. We disagree.

Our standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational jury could have found the essential elements of the crime beyond a reasonable doubt. People v. Collins (1985), 106 Ill. 2d 237, 261; PEople v. Martin (1995), 271 Ill. App. 3d 346, 351; People v. Torres (1995),269 Ill. App. 3d 339, 346.) This standard does not allow the reviewing court to substitute its judgment for that of the jury on questions involving the weight of the evidence or the credibility of witnesses. (Torres, 269 Ill. App. 3d at 346; People v. Wych (1993), 248 Ill. App. 3d 818, 823.) Where the evidence is conflicting, it is the prerogative of the jury to ascertain the truth and resolve minor discrepancies in the testimony of witnesses. (Martin, 271 Ill. App. 3d at 351; People v. Taylor (1995), 269 Ill. App. 3d 182, 188.) The testimony of only

one credible witness can suffice to sustain a conviction.(People v. Benitez (1004), 269 Ill. App. 3d 182, 188.) A reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilty. Wych 248 Ill. App. 3d at 824.

Considered in light of the above standards, the evidence is sufficient to sustain defendant's conviction. N.S.'s account of defendant's assault upon her at the Trujillo residence remained remarkably consistent as told to her mother, to Pleasant, and at trial. The claimed deficiencies in her account of the incident and her ability to state precisely when it occurred are matters of weight and credibility best left to the jury. Under the facts before us, we cannot say that the evidence is so unreasonable, improbable, or unsatisfactory as to raise a reasonable doubt of defendant's guilty. See People v. Eastland (1994), 257 Ill. App. 3d 394, 402.

Defendant's third and final principal contention is that defendant's

of 15 years' imprisonment is "excessive, cruel and unusual in violation of the Eight Amendment to the United States Constitution."

Although defendant frames this contention as a challenge under the eighth amendment to the Untied States Constitution (U.S. Const., amend. VIII), nowhere in the body of his argument does he cite that amendment or any case addressing to. Thus, to the extent his sentencing argument relies on the eighth amendment, it is waived. (See e.g., People v. Williams (1994), 267 Ill. App. 3d 82, 86.) Putting aside defendant's eighth amendment argument, he essential seeks to have this court re-weigh the evidence in aggravation and mitigation and resentence defendant to a lesser term.

A trial court's sentencing determination is entitled to great deference. (People v. Illgen (1991), 145 Ill. 2d. 353, 279; People v. Calahan (195), ____ Ill. App. 3d___,___, 649 N.E. 2d 588, 590.) This discretion is based upon a recognition that a trial court is in a far better position than a reviewing court to consider the defendant's credibility, demeanor, and moral character in

bility, demeanor, and moral character in fashioning an appropriate sentence. (People v. Raya (1994), 267 Ill. App. 3d 705, 708.) Absent an abuse of discretion, we will not reverse a trial court's sentencing decision. (People v. Damnitz (1994), 269 Ill. App. 3d 51, 63.) Where a sentence is within the statutory limitations, an abuse of discretion can be found where the sentence is manifestly unjust, palpably erroneous, or "is greatly at variance with the purpose and spirit of the law." (People v. Burnett (1994), 267 Ill. App. 3d 11, 16.) A trial court's consideration of factors in mitigation or aggravation is not to be reweighed by a reviewing court. Torres, 269 Ill. App. 3d at 350.

Defendant was convicted of aggravated criminal sexual assault, a Class X felony which carries a potential sentence of 6 to 30 years. (see 720 ILCS 5/12-14 (b)(1) (West 1994); 730 ILCS 5/5-8-1(a)(3) (West 1994).) The record indicates the trail court carefully weighed all of the factors in mitigation, including defendant's age (55 at the time he was sentenced). Similarly, the records indicates the trial court considered the

criminal record, which includes numerous convictions spanning more that 25 years. After considering all of the evidence in aggravation and mitigation, the trial court determined that a 15-year sentence was appropriate. We hold that trial court did not abuse its discretion in imposing this sentence.

Accordingly, for the reasons stated above, the judgment of the circuit court of Lake County is affirmed.

Affirmed

BOWMAN, J.,m with THOMAS and HUTCHINSON, JJ., concurring.

ILLINOIS SUPREME COURT
79965 JULEANN HORNYAK,CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
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December 6, 1995

Mr. Robert P. Will, Jr.
Will & Briscoe
7 S. County Street
Waukegan, IL 60085

No. 79665- People State of Illinois, respondent, v. Robert G. Trujillo, petitoner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 28,1995.